UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, vs. Tyson Foods, Inc., et al., Defendants.	**Case No. 4:05-cv-00329-GKF-PJC** **DEFENDANTS' OMNIBUS MOTIONS IN LIMINE AND SUPPORTING BRIEF**

Defendants in the above captioned action hereby move the Court for the following in limine orders:

1. The Court Should Exclude Nutrient Management Plans from Watersheds Other than the IRW.

The Court should exclude from evidence at trial Nutrient Management Plans ("NMPs") from watersheds other than the IRW. Such NMPs are irrelevant to the issues in the present case and would unfairly prejudice Defendants. Plaintiffs' Exhibit List contains a large number of exhibits relating to watersheds other than the IRW. For example, Plaintiffs list hundreds of exhibits that are NMPs and NMP updates for what appear to be all growers in the Eucha-Spavinaw watershed. See, e.g., Pl.' Exs. 1382-1581, 1696-1704, 2075-2153.[1]

The Court should exclude such non-IRW NMPs because they are not relevant to the issues in the present case. Neither the growers nor the fields involved in these NMPs are in the IRW, making the probative value of the plans in the present case negligible. See Fed. R. Evid.

[1] Because of the number and size of these proposed NMP exhibits, Defendants have not attached copies to this motion. Should the Court wish to receive copies, Defendants will be happy to provide them.

401. Moreover, these NMPs and annual updates were explicitly drafted to meet the terms of the City of Tulsa settlement agreement (see Ex. 1: Pls.' Ex. 1382, at 5; Ex. 2: Pls.' Ex. 4072 at 21-22), and therefore may reflect conditions not applicable to growers in the IRW.[2]

In addition, admission of these non-IRW NMPs would be unfairly prejudicial to the Defendants. Such documents could inappropriately imply that any litter applications or soil test phosphorus ("STP") levels they describe could serve as a basis for relief here, when as a matter of law they cannot. See Fed. R. Evid. 403.

The Court should exclude from evidence at trial any non-IRW NMPs.

2. The Court Should Exclude Evidence Relating to Settlement of City of Tulsa Case.

In addition to excluding evidence relating to other watersheds generally, the Court should also exclude any testimony or documents concerning the City of Tulsa v. Tyson Foods case, Docket No. 01 CV 0900EA(C) (N.D. Okla.), and in particular should exclude evidence concerning the settlement of that case. Such evidence would be irrelevant and unfairly prejudicial, and would violate Rule 408's bar on introduction of settlements or related negotiations.

As a threshold matter, the allegations in the City of Tulsa case and the case itself are irrelevant for the same reasons discussed in section 1 above. The City of Tulsa case involved the Eucha-Spavinaw watershed, not the Illinois River Watershed at issue here. In addition, the specific documents Plaintiffs have listed address specific unique disputes in the City of Tulsa case. See Ex. 3: Pls.' Ex. 3873 (Order on Defendants' Emergency Application for Order

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[2] In addition to these Eucha NMPs from the City of Tulsa settlement (Pl. Exs. 1382 to 1581, 1696 to 1704, and 2075 to 2153), Plaintiffs' proposed exhibits also include non-IRW NMPs found in non-IRW ODAFF files. See, e.g., Pl. Ex. 2155 at 15-21, 84-99, 169-195.

Approving Phosphorus Index); Ex. 4: Pls.' Ex. 3874 (Order on Plaintiffs' discovery motion regarding USDA documents); Ex. 5: Pls.' Ex. 3361 (Poultry Defendants' Response to Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Grower's Disposal of Poultry Manure or, in the Alternative, Motion and Brief to Strike Plaintiffs' Motion). These documents have no bearing on the distinct issues here and can only confuse the trial with collateral issues and disputes.

In addition to all these grounds, the Settlement Agreement and related documents from the City of Tulsa case face an additional barrier to admission: Federal Rule of Evidence 408. See Exs. 6-8: Pls.' Exs. 4072, 3875, and 3359 (City of Tulsa Court Order approving settlement agreement, vacating order of March 14, 2003, and administratively closing case). Rule 408 provides in relevant part:

> **Rule 408. Compromise And Offers To Compromise**
>
> **(a) Prohibited uses.**—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> **(2)** conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
>
> **(b) Permitted uses.**—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

The City of Tulsa Settlement Agreement and the related documents undeniably constitute evidence of the compromise of a claim, and thus fall within the plain language of Rule 408(a)(1).

Plaintiffs have indicated that they intend to offer the City of Tulsa Settlement Agreement

for the purported purpose of showing that Defendants in some sense "control" contract growers' disposition of poultry litter. See, e.g., Dkt. No. 2178 at 6 ("Lastly, as shown by the City of Tulsa settlement, Defendants … have the ability to control the growers and the disposal of the poultry waste."); Dkt. No. 2070-10 (Tolbert P.I. Test. at 94-95); Dkt. No. 2070-11 (City of Tulsa Consent Decree at 8-9). Such an purpose, however, fails to overcome the prohibition of Rule 408 for several reasons.

First, Plaintiffs' proposed use would still employ the Settlement Agreement to try to prove Defendants' liability. A key part of Plaintiffs' burden in proving that each Defendant in the present case is liable requires Plaintiffs to prove that each Defendant actually has sufficient control over its contract growers' disposition of poultry litter to justify an injunction or a civil penalty. (See, e.g., Second Am. Compl. ¶¶ 31-44, 46: Dkt. No. 1240.) Plaintiffs' intended use of the Settlement Agreement to try to satisfy this "control" element would thus be using the Agreement "to prove liability for … a claim that was disputed as to validity," the very purpose that Rule 408 forbids.

Second, the Settlement Agreement does not in fact support the inference of "control" that Plaintiffs would have the Court draw from it. The Agreement nowhere asserts that the Defendants in that action in fact had any preexisting control over contract growers' disposition of poultry litter. Any such inference of "control" is purely the result of a mistaken reading of the Agreement by Plaintiffs, who are, after all, complete strangers to the Settlement Agreement. In fact, the City of Tulsa defendants consulted with their contract growers *before* entering into the Settlement Agreement to make sure that the growers were agreeable to the terms and that the defendants did not commit in the Agreement to anything that they could not accomplish. See Mar. 3, 2008 P.I. Hrg. Tr. at 1355:8 – 1356:4 (testimony of Patrick Pilkington): Dkt. No. 1784;

see also Dkt. No. 2183 at 10.) If the Court were to admit the City of Tulsa Settlement Agreement here, the particular Defendants involved would have little choice but to call witnesses to demonstrate the circumstances of the settlement and the consultations preceding it, creating an unnecessary side dispute on a collateral issue and thereby prolonging and complicating the trial.

Finally, even assuming for the sake of argument that Plaintiffs' attempted use of the settlement documents were accurate, relevant, and offered for some reason other than demonstrating liability, many of the Defendants in the present case—specifically Tyson Poultry, Inc., Tyson Chicken, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill Turkey Production, LLC, and George's Farms, Inc.—were not even parties to the City of Tulsa case. The Settlement Agreements does not even arguably reveal anything about those Defendants' individual contractual relationships with their contract growers, and thus cannot possibly have any relevance to "control" or any other issue relating to those defendants. See Fed. R. Evid. 401. Moreover, the introduction of the Settlement Agreement would be highly and unfairly prejudicial to those Defendants, shifting the balance heavily against admission. See Fed. R. Evid. 403.

In sum, the Court should exclude any evidence of or relating to the City of Tulsa case.

3. The Court Should Exclude All Evidence Relating in Any Way to the Locust Grove Incident.

The Court should bar any evidence or testimony concerning the recent food poisoning incident in Locust Grove. As the Court in aware, in the summer of 2008, hundreds of people were sickened and one died from *E. coli* poisoning in Locust Grove. However, other than public speculation by Attorney General Edmondson, see, e.g., http://www.ecoliblog.com/2009/03/articles/e-coli-outbreaks/more-e-coli-found-in-locust-grove-ok-water-wells/; Ex. 9 at 24-26 (A.G. Edmondson's Powerpoint presentation), no one has ever suggested that this *E. coli* contamination was linked in any way to poultry litter. On the contrary, state health officials have

rejected the Attorney General's assertions.

Given the Attorney General's public comments, the Court should issue a prophylactic order barring Plaintiffs from eliciting any testimony or offering any evidence relating to the Locust Grove incident. Plaintiffs have identified no credible link between the illnesses at Locust Grove and the land application of poultry litter, and such evidence thus could have no possible relevance to the issues before the Court in this case. See Fed. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). On the contrary, such evidence could be offered only to appeal to emotion and to unfairly try to connect poultry litter (and through it the Defendants) with a public tragedy without any factual basis for such a connection. See Fed. R. Evid. 403.

Plaintiffs cannot justify the offer of such evidence on the ground that the Court in a bench trial may simply reject it or ignore it. The evidence is still irrelevant and still prejudicial, and (given the Court's knowledge of those facts) Plaintiffs' offer could only be intended to influence the press that will likely be attending the trial. A desire for publicity concerning factually unsupported implications is not a basis for admission or even for an offer of evidence.

Moreover, admission of any evidence concerning the Locust Grove incident would be unfair to Defendants because the Court earlier prevented Defendants from conducting discovery concerning that incident. In the context of Defendants' motion to reconsider a protective order and to permit Defendants to depose Attorney General Edmondson about the basis for his public statements about the Locust Grove events, the Court rejected any inquiry into the incident as too remote:

> THE COURT: All right. On [Docket] 1921, which is the motion to reconsider the ruling about the attorney general's deposition with respect to e-coli in Locust

> Grove, I'm going to deny the motion to reconsider. I think it's irrelevant. Locust Grove is not within the Illinois River Watershed and we're so late in the day to be opening the door to that issue that I just don't think that's appropriate. So the motion to reconsider will be denied.

(Apr. 7, 2009 Hrg. Tr. at 2:17-2:25: Dkt. No. 1977.)

Testimony on issues excluded from discovery should be prohibited. E.g., Kinnee v. Shack, Inc., 2008 U.S. Dist. LEXIS 37304, at *16 (D. Or. May 6, 2008) (where discovery was temporally limited, the plaintiff was not permitted to testify or present evidence at trial outside that timeframe). Inasmuch as the Court has foreclosed Defendants from taking any discovery into Plaintiffs' evidence relating to Locust Grove, it would be fundamentally unfair to permit Plaintiffs to introduce evidence or argument concerning Locust Grove.

In sum, the Court should exclude any evidence concerning the Locust Grove incident.

4. The Court Should Exclude Plaintiffs' "Kitchen Sink" Exhibits and Require Plaintiffs to Provide Specific Justification for the Admission of Distinct Documents.

The Court should exclude the multiple exhibits Plaintiffs have proposed that are in essence "kitchen sink" exhibits, that is, composite exhibits made up of often unrelated documents from a variety of sources. For example, Plaintiffs' proposed Ex. 72 (attached here as Ex. 10) is a 110-page composite document that appears to consist of various examples of alleged violations and complaints against growers. This single exhibit includes all of the following:

- ODAFF letters to Bev Saunders regarding technical violations (2 pages)
- Bev Saunders deposition excerpt regarding violations (5 pages)
- State Board of Agriculture Administrative Law Order regarding violations by Charlie Smith (2 pages)
- ODAFF Checklist regarding Scott Stricklen (2 pages, each from a different year)
- ODA letter to Robert Williams regarding a CAFO inspection (1 page)
- ODAFF Checklist regarding Robert Choate (1 page)
- ODAFF letters to Byron Unrush regarding technical violations (1 page)
- Unidentified photos with ODA bates numbers (8 pages)
- Water Quality Services Investigation Report regarding Perry Williams (3 pages)
- Summary Exhibits of Steele Investigator documents and photos (the resolution is so small that Defendants' attorneys cannot make out what farms are at issue) (4 pages)

Plaintiffs have taken the same approach in assembling unrelated portions of expert productions into single large exhibits. For example, Plaintiffs' proposed Exhibit 185 (attached here as Ex. 11) consists of 59 pages of seemingly unrelated documents from the Cargill Defendants' expert Tom Ginn's production, including a draft Exponent Health and Safety Site Visit Questionnaire, multiple administrative e-mails with counsel, considered materials from third parties, bio-security protocols, cover e-mails with exchanges of data, and newspaper articles.

Although many of the documents comprising these "kitchen sink" exhibits have their own specific evidentiary flaws, the central problem that the Court should address in limine is Plaintiffs' improper combination of such unrelated or marginally related documents into single exhibits. The differences among the various documents comprising these giant exhibits will make their admission difficult, complicated, and time-consuming. None of these "exhibits" has any character, relevance, or foundation of its own. The separate components of these exhibits have different bases of authenticity and foundation that will need to proven separately. They lack common relevance; some components will be more probative than others, while others will have a more unfair prejudicial effect. They will differ in their status as hearsay or hearsay exceptions, sometimes on multiple levels. In short, the exhibits as Plaintiffs have defined them are not single exhibits at all but mere components amalgamated without rhyme or reason. The Court should exercise its control over the mode of presentation of evidence and require Plaintiffs to present these exhibits in a more reasonable and logical manner. See Fed. R. Evid. 611.

The admission of these conglomerate exhibits would also unfairly prejudice Defendants in several ways. See Fed. R. Evid. 403. For example, an agency report that constitutes part of an exhibit may carry a weight of authority that improperly carries over to other parts of the exhibit

that come from less reliable sources. Conversely, exhibits from different sources carelessly amalgamated into a single "exhibit" may imply an unfair and improper kind of "guilt by association." For example, an action by a grower who contracts with one Defendant could negatively and unfairly reflect on the others. (See, e.g., Ex. 10: Pls.' Ex. 72, Ex. 12: Pls.' Ex. 166, Ex. 13: Pls.' Ex. 3890.) Many of Plaintiffs' proposed combined expert data exhibits also suffer from this same infirmity. (See, e.g., Ex. 14: Pls.' Ex. 146, Ex. 11: Pls.' Ex. 185, Ex. 15: Pls.' Ex. 280.)

In sum, these exhibits are not proper exhibits at all, and the Court should bar their introduction and compel Plaintiffs to offer each of the separate components on its own merits.

5. The Court Should Exclude Evidence Relating to Discovery Disputes Among the Parties.

The Court should exclude Plaintiffs' exhibits and testimony concerning earlier discovery disputes among the parties. For instance, Plaintiffs' proposed Exhibit 166 (another conglomerate exhibit attached here as Ex. 12) appears to assemble responses from all Defendants related to bird count numbers and responses to Plaintiffs' Interrogatory No. 1. It also includes back and forth exchanges between attorney for the George's Defendants' James Graves and Plaintiffs' attorney Rick Garren over the George's Defendants' responses. (Id.; see also Ex. 16: Pls.' Ex. 65 at 46-50 (generally same as above).)

Discovery is over, and the parties' discovery disputes are in the past. The trial will be about the facts that the parties actually offer, not the discovery they sought. Old discovery disputes have no bearing on the facts that the Court is to find, and introduction of such exhibits and testimony can only waste the Court's time and create unfair impressions of the litigants that have nothing to do with the issues before the Court. See Fed. R. Evid. 401, 402, 403.

The Court should exclude evidence concerning the parties' past discovery disputes.

6. The Court Should Exclude Plaintiffs' Improper Rule 1006 Exhibits.

The Court should exclude several vague and misleading Rule 1006 summary documents that Plaintiffs have listed as exhibits. These are exhibits either have broad category descriptions that improperly imply facts that their underlying sources do not support or are flat out wrong.

An example of the first category is Plaintiffs' proposed Exhibit 3154 (attached here as Ex. 17). This exhibit purports to be a "Cover Sheet to Exhibit 9 to Gordon Johnson Deposition (ODAFF)." What this is intended to mean is unclear, but the exhibit includes a purported "Average STP" for "Honeysuckle White" of 303.96. No other information is given about this figure, and no source for the data is identified. A fact finder could easily assume from this document that Average STP means an average across the IRW, but the lack of proper foundation makes any such inference speculative and effectively prevents Defendants from discrediting the (unknown) source.

As to the second category, an example is the May 27, 2009 Declaration by Plaintiffs' expert Bert Fisher, filed at Docket Nos. 2178-13 and 2182-11. The May 27, 2009 Declaration attaches three charts (Attachments A, B, and C) and an unlabeled map at page 18 further illustrating the data charted in Attachment A. (Plaintiffs marked the chart at Attachment A as their proposed Exhibit 3243.) Dr. Fisher avers in his declaration that his consulting group, under his direction and supervision, "reviewed and analyzed all available discovery documents which contain soil test phosphorus ('STP') information traceable to Defendants," and that the chart and map at Attachment A depict "a true and correct summary of this STP record review … [f]or each field with a reported STP," by reference to "integrator." (Fisher May 27, 2009 Decl. ¶¶ 6, 7, 10.) In fact, however, Dr. Fisher's Attachment A chart and map contain selective, hand-picked data chosen to present a misleading and inaccurate picture under the veneer of an expert's Rule 1006 "summary." Because Dr. Fisher omitted record STP data helpful to Defendants, his claim that

the chart amounts to "a true and correct summary" is demonstrably untrue and the Court should not countenance it. The chart and map are misleading, will confuse the jury, and are extremely prejudicial to Defendants, and the Court should exclude them. See Fed. R. Evid. 403.

For example, Plaintiffs suggest that Cargill contract growers apply litter in fields with high STP levels by reference to the Attachment A chart, which includes many STP results for fields *where there is no record evidence that litter has been applied at all*. Specifically, Fisher's declaration supposedly relies on documents regarding Cargill contract grower Earnest Doyle that show that in fact no litter was applied on any referenced Doyle field associated with Dr. Fisher's chart and map. See OKDA0003084, OKDA0003087, OKDA0003085, OKDA0003046, OKDA0003043-44, OKDA0003040-42, OKDA0003036-38, OKDA0003032-34, OKDA0003029-31, OKDA0003026, ODAFF-JD-029312, 2009 Cargill supp-0014-15, ODAFF_SUPP_05-08_002019-20 (together, attached here as Ex. 18); see also Feb. 2008 Doyle Aff. ¶¶ 6-7 (Dkt. No. 1552-7) (averring that Doyle does not apply on his own property). Similarly, although Dr. Fisher states that "the available STP data also shows that the majority of fields linked to Defendants are in excess of the disposal threshold of 120 lbs/acre" (May 27, 2009 Decl. ¶ 11), Dr. Fisher selected only eleven unique STP samples from fields of Cargill contract growers for the chart.[3] Not surprisingly, many of the dozens of record samples ignored by Dr. Fisher's Attachment A chart and map indicate much lower STP results that those selected. See, e.g., OKDA0016339 (STP of 7), OKDA0016340 (STP of 17), OKDA0016343 (STP of 26), OKDA0016344 (STP of 26), OKDA0016345 (STP of 7) (together, attached here as Ex. 19).

[3] Three additional samples were duplicates, two were not from a field belonging to a Cargill contract grower (OKDA0006382, OKDA0006386), and two were from fields outside the IRW. (OKDA0004010 and OKDA0004012). (Together, attached as Ex. 20; see also A. Davis Dep. at 143:13-154:17: Dkt. No. 2207-2.)

Thus, despite claims to the contrary, the documents demonstrate that Dr. Fisher's declaration in no way provides comprehensive summaries of the STP record data.

In sum, the Court should exclude these improperly prepared and documented Rule 1006 summary exhibits.

Date: August 5, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and a true and correct copy of the foregoing was sent via separate email to the following:

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